

STATE OF MICHIGAN
IN THE SUPREME COURT

JAMES A. LOOS, JR.

Plaintiff-Appellee,

vs

J.B. SUPPLY COMPANY, INCORPORATED/
J.B. INSTALLED SALES and ACCIDENT
FUND INSURANCE COMPANY OF AMERICA,

Defendants-Appellants.

Supreme Court:
137987

Court of Appeals:
275704

Lower Court: WCAC
Docket No: 050246

137987
PLA's Suppl

PLAINTIFF'S SUPPLEMENTAL BRIEF

PROOF OF SERVICE

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COUNTER-STATEMENT OF BASIS OF JURISDICTION

Plaintiff accepts defendant's statement of the basis for this Court's jurisdiction in its application for leave to appeal.

STATEMENT OF QUESTIONS PRESENTED

IS THE DETERMINATION OF WHETHER AN EMPLOYER-EMPLOYEE RELATIONSHIP EXISTS BETWEEN THE PARTIES FOR WORKERS' COMPENSATION PURPOSES NOT GOVERNED BY THE LABELS OR CHARACTERIZATIONS THEY APPLY TO THEIR RELATIONSHIP?

Plaintiff-Appellee answers "YES."

The WCAC answered "YES."

The Court of Appeals answered "YES."

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STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

The issue in this matter is whether plaintiff James Loos was an employee of Robinson Roofing, so as to permit the assessment of "shoot-through" workers' compensation liability upon its principal, J.B. Supply Company, Incorporated, and its workers' compensation carrier, Accident Fund Insurance Company of America.

In an order dated May 1, 2009, this Court directed that oral argument be held on the question, and permitted the parties to file supplemental briefs within 42 days of the order. Plaintiff now submits his supplemental brief.

ARGUMENT

THE DETERMINATION OF WHETHER AN EMPLOYER-EMPLOYEE RELATIONSHIP EXISTS BETWEEN THE PARTIES FOR WORKERS' COMPENSATION PURPOSES IS NOT GOVERNED BY THE LABELS OR CHARACTERIZATIONS THEY APPLY TO THEIR RELATIONSHIP.

Standard of Review. This Court may reverse the WCAC if it applies erroneous legal reasoning or operates within the wrong legal framework, and reviews questions of statutory construction de novo. *DiBenedetto v West Shore Hospital*, 641 Mich 394; 605 NW2d 300 (2000); *Oxley v Dep't of Military Affairs*, 460 Mich 536; 597 NW2d 89 (1999).

In prior briefing, plaintiff argued that the tax filings of he and his alleged employer are not determinative of the nature of their relationship for workers' compensation purposes. In that regard, plaintiff contended that the self-serving characterizations of the parties should not be given controlling effect.

This is certainly not a new concept. Prior to the enactment of what is now MCL 418.161(1)(n), the courts applied the "economic reality" test to workers' compensation cases to govern the determination of whether a claimant was an employee or independent contractor. In applying that test, the Court expressly noted the importance of avoiding "paperwriting evasions," and rejected reliance upon "terminology, oral or written":

The earlier cases tested this relationship through application of the "control" factor, originally a test for tortious liability, having its roots in the relationship of the apprentice to his master in early English industrial society. As applied to today's complex economy of the assembly line, of dispersed industrial operations, of concentrated operations but with semi-autonomous "departments" or branches, and of general contractors who, in turn, employ subcontractors and sub-subcontractors, the "control" test is often meaningless, usually ambiguous, and always susceptible of paperwriting evasions. Consequently we have abandoned it. *Tata v Benjamin Muskovitz Plumbing & Heating*, 354 Mich 695; 94 NW2d 71; The test is now one of economic reality. *Powell v Employment Security Commission*, 345 Mich 455, dissent, 462, 478; 75 NW2d 874, 878; *Salmon v Bagley Laundry Company*, 344 Mich 471 dissent, 475; 74 NW2d 1, 3; *United States v Silk*, 331 US 704; 67 S Ct 1463; 91 L Ed 1757. This is not a matter of terminology, oral or written, but of the realities of the work performed. Control is a factor, as is payment of wages, hiring and firing, and the responsibility for the maintenance of discipline, but the test of economic reality views these elements as a whole, assigning primacy to no single one. See also *Pazan v Michigan Unemployment Compensation Commission*, 343 Mich 587, dissent 592; 73 NW2d 327, 329. [*Schulte v American Box Bd. Co*, 358 Mich 21, 33; 99 NW2d 367 (1959)]

In extending the same test to determine whether a given party was an employer so as to gain protection of the exclusive remedy provision of the Worker's Disability Compensation Act, MCL 418.131, the Court noted that the characterization given a relationship by a contract between the parties would not control the outcome:

Finally, this analysis would not be complete without discussing the meaning of the agreement between CLS and Miller-Davis. We are cognizant that this contract attempts to disavow any employer-employee relationship between the two parties. However, we can not accept the plaintiffs' characterization of the agreement and refuse to hold that it alone is dispositive of the status of the parties. Just as we have held that control is but one factor to consider under the economic-reality test, so is the contract but one factor. Parties enter into contracts to serve all kinds of purposes in delineating rights, responsibilities, and liabilities, whether for tax, insurance, or other reasons. We hold that the economic reality of these cases is that the rights and responsibilities over these workers were shared by both Miller-Davis and CLS and that the agreement is neither dispositive nor controlling. See *Fitzgerald v Mobil Oil Corp*, *supra* at 1303; *White v Central Transport, Inc*, 150 Mich App. 128; 388 NW2d 274 (1986); *Tolbert v US Truck Co*, *supra*. We believe this conclusion best advances the principles embodied within the WDCA. [*Kidder v Miller-Davis Co*, 455 Mich 25, 46; 564 NW2d 872 (1997)]

As these excerpts make clear, the parties' own characteristics of their relationship are not controlling. To permit otherwise would be to permit the very "paperwriting evasions" the *Schulte* Court wished to avoid.¹

However, the ruling defendant requests would change all this. If the parties' tax records, and the way they characterize their relationship in those records, is truly "the 'decisive evidence,' 'dispositive of the issue,' and the 'very persuasive' factor" defendant claims in its application², the idea that the parties should not be allowed to manipulate the system by "paperwriting evasions" will have been lost.

The irony of this situation should not be lost on the Court. Certainly, the Internal Revenue Service does not consider itself bound by the parties' characterizations of their relationship. The IRS has created a so-called "20-point control test" that operates much as does the economic reality test, to determine the true nature of a relationship without

¹This type of analysis is not limited to questions of employment. The courts have also applied it when reviewing financial statutes, in the process looking "beyond the form of the transaction to its substance, paying special attention to the economic realities of the situation. *Ansorge v Kellogg*, 172 Mich App 63, 68-69; 431 NW2d 402 (1988).

²Defendant's Application for Leave to Appeal, at 11.

regard to the characterization given it by the parties thereto. The test was set forth in Rev Rul 87-14, a copy of which is attached to this brief. More recently, the IRS has streamlined the test, to look to more general classes of factors including (a) behavioral control, (b) financial control, and (c) the relationship of the parties. A description of this test is included in IRS Publication 1779, a copy of which is also attached.

Furthermore, plaintiff previously argued that he had no alternative but to file taxes as he did, once issued a Form 1099 instead of a W-2 by Robinson Roofing. The IRS has since taken steps to address this anomaly by creating a new form that would permit a party to properly report income that should have been reported by the employer as wages, but was not. However, that form was not available for tax years prior to 2007, as noted in the IRS' newsletter, IR-2007-203, attached to this brief as well. For all periods relevant to this case, plaintiff had no alternative but to report his income on Schedule C and pay self-employment tax.

Clearly, any argument that the parties' characterization of the relationship must control, whether manifested in a contract, in tax filings, or anywhere else, must be rejected. That characterization is *always* subject to review and revision. In this case, the review is to be conducted pursuant to MCL 418.161(1)(n), which superseded the economic reality test but still applies some of its critical factors. *Hoste v Shanty Creek Mgt, Inc*, 459 Mich 561; 592 NW2d 360 (1999). As a result, this Court should not settle for defendant's contention that the tax records control, absent an express ruling from the IRS that the parties have not misclassified their relationship.

A finding to that effect would render unnecessary a ruling on the further issue of whether the WCAC exceeded the scope of its factual review powers. The magistrate blindly adhered to the tax filings, writing, "Had Plaintiff been an employee of Robinson Roofing, he would have been paid on a W-2, just as he was with Local Roofing, Inc. and Mid-Michigan Roofing." Magistrate's Opinion, at 15-16. If this Court finds that such

adherence is legally inappropriate, the magistrate erred as a matter of law and the issue of the WCAC's factual review will not enter into the final disposition of this case.

RELIEF

WHEREFORE Plaintiff-Appellee JAMES A. LOOS, JR. respectfully renews his request that this Honorable Supreme Court deny defendant's application for leave to appeal or, in the alternative, requests that the Court reject defendant's suggestion that tax records control or are dispositive relative to the issue of the existence of an employer-employee relationship. Plaintiff further requests any other relief to which he may be entitled.

Respectfully submitted,



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